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Private Enforcement as a Deterrence Tool: A Blind Spot in the Omnibus-Directive

Charlotte PAVILLON*

Abstract: The Directive on better enforcement and modernization of EU consumer protection rules or Omnibus-directive does not acknowledge the deterrence function of private enforcement of EU consumer law. The article demonstrates that the balancing of the principles of effectiveness, proportionality and dissuasiveness requires more attention when it comes to ‘civil remedies’. Indeed, the Court of Justice of the European Union (CJEU) has in recent years put a clear emphasis on the deterrence function of the non-binding effect of unfair contract terms, a civil sanction imposed by civil courts. These courts, however, are struggling with the implications of this function. They are actively searching for direction by referring new preliminary questions to the CJEU. Empirical research conducted in the Netherlands shows that Dutch district courts largely recognize their role as enforcer of EU consumer law. It also reveals that these courts consider the proportionality and the dissuasiveness of the sanction to be at odds when the gap left after the removal of an unfair contract term is not filled with national law.

Resumé: La directive concernant une meilleure application et une modernisation des règles de protection des consommateurs de l’UE ou directive Omnibus ne reconnaît pas la fonction dissuasive des recours introduits par les particuliers. L’article tend à démontrer que la conciliation des principes de proportionnalité, d’effectivité et du caractère dissuasif des sanctions requiert plus d’attention dans le contexte spécifique de l’action privée. En effet, la Cour de Justice de l’Union européenne a récemment mis l’accent sur la fonction dissuasive du caractère non-contraignant de la clause abusive, une sanction appliquée par le juge civil. Celui-ci se demande néanmoins comment donner effet à cette fonction. Les cours civiles cherchent une orientation en renvoyant des questions préjudicielles à la Cour de Justice européenne. Des recherches empiriques réalisées aux Pays Bas démontrent que les cours civiles reconnaissent leur rôle de garant de l’application du droit de la consommation. Il en ressort aussi que ces cours considèrent la sanction consistant à ne pas substituer à la clause abusive des dispositions législatives supplétives très dissuasive mais en contradiction avec le principe de proportionnalité.

Zusammenfassung: Die Richtlinie zur besseren Durchsetzung und Modernisierung der EU-Verbraucherschutzvorschriften oder Omnibus-Richtlinie erkennt die abschreckende Wirkung der privaten Durchsetzung des EU-Verbraucherrechts nicht an. Der Artikel zeigt, dass die Abwägung der Grundsätze der Wirksamkeit, Verhältnismäßigkeit und Abschreckung mehr Aufmerksamkeit erfordern im spezifischen Kontext der privaten

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Durchsetzung. Allerdings hat der EuGH in den letzten Jahren die abschreckende Wirkung der Unverbindlichkeit von missbräuchlichen Vertragsklauseln - einer zivilrechtlichen Sanktion, die von Zivilgerichten verhängt wird - klar herausgestellt. Nationale Gerichte kämpfen jedoch mit den Auswirkungen dieser Funktion. Sie suchen aktiv nach einer Richtungsvorgabe, indem sie dem EuGH regelmäßig neue Vorabentscheidungsverfahren vorlegen. Eine in den Niederlanden durchgeführte empirische Studie zeigt, dass niederländische Bezirksgerichte ihre Rolle als Durchsetzer des EU-Verbraucherrechts weitgehend anerkennen. Die Studie zeigt auch, dass die Gerichte die Verhältnismäßigkeit und die abschreckende Wirkung der Sanktionen als widersprüchlich ansehen, wenn eine missbräuchliche Klausel nicht durch innerstaatliches dispositives Recht ersetzt werden würde.

Keywords: European consumer law, sanctions, civil law, unfair contract terms, civil courts

Mots-clés: enforcement Droit de la consommation européen, sanctions, droit civil, clauses abusives, juridictions civiles

Schlüsselbegriffe: Europäisches Verbraucherschutzrecht, Sanktionen, Zivilrecht, Missbräuchliche Vertragsklauseln, Zivilgerichte, Durchsetzung

1. Introduction

1. Since the turn of this century, the CJEU's case law has repeatedly stressed the role of civil judges as enforcers of EU consumer law. Civil courts are for instance obliged to apply consumer law on their own motion in order to protect the weaker party in civil proceedings.¹ As regards unfair contract terms, the CJEU has handed down a series of decisions putting the emphasis on the intended dissuasive effect of the nullity sanction laid down in Article 6 of the Unfair Contract Terms Directive (1993/13/EEC; UCTD).² In order to prevent the continued use of unfair terms civil courts are not allowed to revise and replace a contract term that was deemed unfair and eliminated from the contract.³ However, the attitude of civil courts towards the *ex officio* examination is very diverse and the case law of the CJEU appears largely ignored.⁴ The same divergences exist as far as civil law remedies on breaches of consumer law are concerned.⁵

1 See e.g. ECJ 4 June 2009, Case C-243/08, ECLI:EU:C:2009:350, *Pannon*, paras 20–35.

2 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

3 ECJ 14 June 2012, Case C-618/10, ECLI:EU:C:2012:349, *Banco Español de Crédito*; ECJ 24 June 2014, Case C-26/13, ECLI:EU:C:2014:282, *Kásler and Káslerné Rábai*, para. 83.

4 Study JUST/2014/RCON/PR/CIVI/0082 on the *ex officio* Application of EU Consumer Protection Law by National Courts (Max Planck Institute 2017); Fitness check, general report, p 90.

5 F. CAFAGGI & P. IAMICELI, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions', 25. *European Review of Private Law* 2017, pp 575–618.

2. European consumer law is primarily associated with remedies and focal point in EU case law and legal literature forms the effectiveness of remedies conferred on consumers.⁶ The word ‘sanction’ automatically brings fines and other (pecuniary) penalties from administrative and criminal origin to mind. Indeed, European private law has been very reticent towards *punitive* damages and supra-compensatory remedies such as damages in excess of the loss suffered by the claimant.⁷ It, however, clearly acknowledges *deterrent* damages, for example in the field of competition and non-discrimination law. In this article, I will demonstrate that the civil law remedies required by consumer directives such as the Unfair Contract Terms Directive (UCTD) constitute sanctions as well and that, if they do so, they ought to meet the same effectiveness, proportionality and dissuasiveness requirements so-called penalties have to comply with.⁸ Many questions remain as to how this triad should be interpreted in a private law setting, especially in the realm of unfair contract terms.

3. The European Commission’s regulatory fitness and performance programme (REFIT Fitness Check) has revealed that national enforcement authorities struggle to strike the right balance between the three requirements and that, in several Member States, public law penalties lack dissuasiveness.⁹ The proposed Directive as regards better Enforcement and Modernization of EU Consumer Protection Rules (hereafter: the Omnibus-Directive)¹⁰ contains strengthened rules on penalties for breaches to EU consumer law and aims at increasing the deterrent effect of penalties. The proposal for instance introduces new rules on penalties in Directive 93/13/EEC on unfair terms in consumer contracts. Unfortunately, the Omnibus-Directive does not entail any clear rules in favour of the *ex officio* enforcement of consumer law by civil courts in *individual* proceedings, nor does it give clear direction to the sanctioning of

6 Next to a compensatory rationality, European private law is also characterized by a competitive rationality: H.W. MICKLITZ, ‘Concept of Competitive Contract Law’, 23. *Penn State International Law Review* 2005, Art. 7; R. MICHAELS, ‘Of Islands and the Ocean: The Two Rationalities of European Private Law’, in R. Brownsword (eds), *The Foundations Of European Private Law* (Hart Publishing 2011).

7 ECJ 10 April 1984, Case C-14/8, ECLI:EU:C:1984:153, *Von Colson*, para. 28; G. WAGNER, ‘Punitive Damages in European Private Law’, in J. Basedow, K.J. Hopt & R. Zimmermann (eds), *Max Planck Encyclopedia of European Private Law* 2012.

8 R. MEEUS, *Sanctionering van het Europees milieurecht. Tussen handhavingsnood en sanctieverplichting*, Antwerpen en Cambridge (Antwerpen: Intersentia 2014), p 94.

9 Study JUST/2014/RCON/PR/CIVI/0082 (2017), p 33.

10 Proposal for a Directive of the European Parliament and of the Council on amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernization of EU consumer protection rules.

consumer law violation by *civil* courts in both individual and collective proceedings. This is remarkable, since most consumer disputes are dealt with by the civil courts of EU Member States and since the *New Deal* also comprises a draft directive on collective redress, which will, assumingly, involve civil courts.¹¹ Both collective actions and the *ex officio* application of civil law sanctions have a lot to offer in terms of deterrence. The *New Deal* should therefore have paid at least some attention to the *deterrent* potential of civil remedies in the field of EU consumer law and the applicability of the triad to civil law sanctions.

4. The first part of the article depicts the deterrence function of private law remedies (para. 2) and explores the available legislation and case law pertaining to civil law sanctions on breaches of EU consumer law (para. 3). This article takes stock of the questions left open at the European level since the different sources of EU law, CJEU case law in particular, lack clarity and consistency. The second part of the article discusses the ‘sanctioning’ of unfair contract terms by Dutch district courts. Recently conducted empirical research shows that at least some guidance from EU level is needed (para. 4). Third, we assess what type of guidance could help civil courts fulfilling their enforcement task (para. 5). The last paragraph contains the conclusion (para. 6).

2. The Deterrence Function of Civil Law Remedies

5. Member States must guarantee the existence of adequate and effective remedies to ensure compliance with EU consumer law. Civil law remedies such as an injunction, damages, rescission, annulment and restitution aim at providing relief for the aggrieved consumer. Consumer directives are mostly silent about what this relief exactly entails.¹² By invoking the remedy, the consumer aims to restore her rights. How remedies and redress schemes are drafted is generally left to the national courts who apply national laws on damages, rescission, restitution etc.

6. When applying national contract and tort law to redress breaches of EU consumer law, civil courts sometimes choose to hit an infringing company hard by setting up a generous compensation scheme and/or by limiting the obligation for consumers to reverse an unjustified enrichment. For instance, the Dutch Supreme Court held that an ‘all-in telephone subscription’ including telecommunication services and a ‘free’ handset, could be qualified as a consumer credit contract and that this contract may be partially voidable, if no separate price for the handset has been determined by the parties, since the Consumer Credit

11 The latest document is the European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM(2018)0184 – C8-0149/2018 – 2018/0089(COD)).

12 A notable exception is the Consumer Sales Directive (1999/44/EC). Art. 3 sums up the remedies the consumer is entitled to pursue in case of non-conformity.

Directive mandates this information to be given. The provider is then obliged to refund the amounts it received for the handset to the consumer. The consumer must return the handset but is in principle not obliged to pay compensation for enjoyment or usage of the handset.¹³ By opting for this remedy, the court went further than simply restoring the consumer's rights and served the *general* consumer interest of *preventing* further infringements on the Consumer Credit Directive.¹⁴ The deterrent impact of the choice for a certain civil law remedy is scaled up when this choice is made in a collective action¹⁵ or when the remedy in question is (systematically) applied *ex officio*.¹⁶

7. Member States may well opt for the use of private law to sanction breaches of EU law.¹⁷ In the Van Colson-judgment, the ECJ held that the chosen sanction for the breach of the prohibition of discrimination laid down in Directive 76/207/EEC must guarantee '*real and effective judicial protection*' and have a '*real deterrent effect*' on potential wrongdoers.¹⁸ It pursues its reasoning by stating that: '*28. (...) if a member states chooses to penalize breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application.*'

8. According to Wagner, '*the recognition of deterrence as a function of the law of damages by the ECJ and subsequent EU legislation marks a departure from the traditional compensation principle.*'¹⁹ It shows that private law may serve as a

13 Hoge Raad der Nederlanden 12 February 2016, *Lindorff/Nazier*, ECLI:NL:HR:2016:236, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2016:236>; For an English summary, see <https://www.stibbe.com/en/news/2016/march/supreme-court-hands-down-a-sequel-judgment-on-all-in-telephone-subscriptions>.

14 Hoge Raad der Nederlanden 12 February 2016, *Lindorff/Nazier*, ECLI:NL:HR:2016:236, para. 3.16.

15 R. VAN DEN BERGH & L.T. VISSCHER, 'The Preventive Function of Collective Actions for Damages in Consumer Law', *Erasmus Law Review* 2008, afl. 2, pp 5-30. See the preamble of above-mentioned proposal, more specifically the impact assessment: '*the deterrent effect of remedies for victims of unfair commercial practices will be stronger with option 3 since, as the 2017 Consumer Conditions Scoreboard confirmed consumers would be more likely to use remedies under the Unfair Commercial Practices Directive if they were also given access to a practical collective mechanism for a qualified entity to handle their case on their behalf.*'

16 ECJ 21 April 2016, Case C-377/14, ECLI:EU:C:2016:283, *Radlinger*, para. 69.

17 As long as they would apply the same rules if national law had been breached: Joint Cases: ECJ 5 March 1996, Joined cases C-46/93 and C-48/93, ECLI:EU:C:1996:79, *Brasserie du pêcheur and Factortame III*.

18 ECJ 10 April 1984, Case 14/83, ECLI:EU:C:1984:153, *Von Colson*, para. 23.

19 Wagner 2012.

preventive means. In the field of EU competition law, the *deterrent* function of damages as a complement to public enforcement has been recognized by the Court.²⁰ This was stressed by A-G Wahl in his opinion in the *Skanska*-case.²¹ This opinion depicts what makes compensation claims deterrent and points at the fact that (potential) mass claims influence the behaviour of undertakings.²² Back in its *Courage*-decision, the ECJ already stressed that ‘*actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.*’²³

9. From recent case law in the field of EU non-discrimination law and IP law²⁴, it appears that even punitive damages are permitted under EU law, as long as the principles of equivalence and effectiveness are respected.²⁵ However, the CJEU keeps stressing that punitive damages should not lead to unjust enrichment, in the light of the principle of proportionality. In breach of EU-law are damages that exceed the loss suffered ‘*so clearly and substantially*’ that they could constitute an abuse of rights.²⁶ A less substantial overcompensation seems thus allowed provided that it is proportionate and effective but EU law does not allow the deterrence function to blatantly take precedence over the compensation function.

10. Actually, EU case law only explicitly embraces the *deterrent* function of compensation, which serves a public consumer interest, next to its compensatory function, which serves the individual consumer interest.²⁷ Deterrent remedies do not intend to punish the wrongdoer but are meant to dissuade him and others from committing the same infringement. As such, they have a preventive effect, besides the fact that they provide full redress to the consumer who suffered from the

20 Even though many Member States and the European legislator do not explicitly acknowledge this function: Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance requires full compensation, which should not lead to overcompensation, whether by means of punitive, multiple, or other damages.

21 Opinion issued by A.G. Wahl in ECJ 14 March 2019, Case C-724/17, ECLI:EU:C:2019:204, *Skanska*.

22 Opinion issued by A.G. Wahl in ECJ 14 March 2019, Case C-724/17, ECLI:EU:C:2019:204, *Skanska*, para. 48: ‘*while the deterrent effect of a single claim for compensation is arguably negligible, it is the number of potential claimants that, together with the increased risk of detection, help explain why private enforcement mechanisms (such as actions for damages) constitute an effective means of ensuring that competition rules are observed.*’

23 ECJ 20 September 2001, Case C-453/99, ECLI:EU:C:2001:465, *Courage*, para. 27.

24 Art. 13 of Dir. 2004/48 of 29 April 2004 concerning the enforcement of intellectual property rights.

25 ECJ 17 December 2015, Case C-407/14, *Arjona Camacho*, ECLI:EU:C:2015:831, para. 44; ECJ 25 January 2017, Case C-367/15, ECLI:EU:C:2017:36, *OTK*, para. 28.

26 ECJ 25 January 2017, Case C-367/15, ECLI:EU:C:2017:36, *OTK*, para. 31.

27 Wagner 2012.

infringement. In practice, Member States never assess whether a deterrent redress scheme actually achieves this prevention goal. The deterrence function of civil law remedies in EU consumer law will be discussed in paragraph 3.

3. European Case Law on Civil Law Sanctions

3.1. *An Undefined Triad?*

11. Many directives leave it to Member States to devise their own penalties on breaches of EU consumer law provided they meet the effectiveness, proportionality and dissuasiveness requirements. Recent consumer directives explicitly mention this triad, without tying it to a specific field of law, an example being the Consumer Credit Directive (2008/48/EC).²⁸

12. The autonomy of Member States to devise private law sanctions on the occurrence of a violation of EU consumer law is limited by the same three requirements governing administrative and criminal sanctions. In France, the creditor who fails to comply with informational obligations laid down in the Consumer Credit Directive forfeits his entitlement to contractual interest.²⁹ In the Netherlands, the contract is voidable.³⁰ Some directives contain remedies, which clearly aim at deterring (further) infringements. For example, Article 14(4)(a) of the Consumer Rights Directive (2011/83/EU), provides that, if the trader has not obtained the consumer's prior express consent to begin performance before the expiry of the right of withdrawal period, the consumer does not have to pay for the services offered. Included in this Directive is also the contractual remedy of exempting the consumer from the obligation to provide any consideration for an unsolicited supply or provision (Art. 27).

13. The Omnibus-directive proposal incorporates the triad into the Injunctions Directive (2009/22/EC) and the UCTD in a rather restrictive way, by only focusing on penalties (and fines) imposed by administrative authorities and courts. The directive also introduces new civil law – both contractual and non-contractual – remedies on unfair commercial practices into the Unfair Commercial Practices Directive (2005/29/EC): contract termination respectively the compensation for damages, but without any reference to their potentially dissuasive effect.

28 Art. 23 of Dir. 2008/48/EC of 23 April 2008 concerning credit agreements for consumers; art. 13 of Dir. 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and art. 24 of Dir. 2011/83/EU of 25 October 2011 concerning consumer rights. Art. 7 UCTD already refers to the need for 'adequate and effective means' (para. 1) and 'appropriate and effective means to prevent the continued use of such terms' (para. 2), which could easily translate to the three requirements.

29 ECJ 27 March 2014, Case C-565/12, ECLI:EU:C:2014:190, *Le Crédit Lyonnais*.

30 Cf. para. 2 ('all-in telephone subscriptions'); Hoge Raad der Nederlanden 12 February 2016, ECLI:NL:HR:2016:236, *Lindorff/Nazier*.

This is striking in view of the fact that the deterrent function of damages has been acknowledged in other fields of EU law and that this function is subjected to the proportionality and effectiveness requirements (see the examples mentioned in para. 2). The three requirements and accompanying guidelines as to how to flesh them out should therefore not be restricted to (administrative) penalties. If a civil court chooses to put the deterrence function of *private* law forward, it should be spurred to take the triad into consideration and offered adequate guidance as to what factors it should take into account.

14. The question then arises: what does the triad exactly entail in a private law setting? How should the three requirements and, more specifically, their mutual relationship, be defined in the specific context of EU private consumer law? Unfortunately, EU jurisprudence and legislative texts relating to consumer law do not provide much guidance. The above questions have seldom been addressed in the CJEU case law. I will analyse the few decisions pertaining to the triad in the next paragraphs. Based on different sources (which do not pertain to private consumer law), the following definitions seem to muster the essence of the criteria.³¹

15. An effective sanction is a sanction that is apt to perform the function for which it was designed. The effectiveness principle requires the removal of obstacles (mainly procedural, think of a high burden of proof) that may prevent this performance. Effective sanctions are capable of ensuring compliance with EU law.

16. A deterrent sanction is a sanction that is sufficiently serious to deter the infringer from repeating the same infringement, and other potential infringers from committing such infringements. A potential infringer, while evaluating whether to breach consumer law on a larger scale, should consider a remedy or redress scheme as a real cost.

17. A proportionate sanction adequately reflects the gravity of the violation and does not go beyond what is necessary for the objectives pursued, i.e. ensuring compliance with EU law and preventing further violations of EU law.

18. The proportionality-principle is one of the fundamental principle of the EU legal order and it is, with reference to civil sanctions, the requirement that leaves the most leeway for diverging interpretations. Whilst the fulfilment of the other two requirements can objectively be measured (has the infringement ended and where new infringements prevented?), there is no definite answer to the question

31 Opinion issued by A.G. Kokott in Joined cases: ECJ 3 May 2005, Joined cases C-387/02, C-391/02 and C-403/02, ECLI:EU:C:2005:270, paras 88-92; Commission Communication on Reinforcing sanctioning regimes in the financial services sector COM (2010) 716; R.M.J. DE RIJCK, 'Doeltreffend, evenredig en afschrikkend: de Europese maatstaf voor de straftoemeting in milieuzaken', *Tijdschrift voor Sanctierecht en Onderneming* 2018, pp 5-13.

whether a sanction is proportionate. It entirely depends on the circumstances of the case. The CJEU underlined that:

‘measures provided for under national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question’.

This entails that:

‘where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (...).’³²

19. In its Communication on Reinforcing sanctioning regimes in the financial services sector, the European Commission has summed up a few factors to help public enforcement authorities to ensure optimal proportionality and dissuasiveness of the sanctions actually imposed on violations of EU financial law. The Commission stated that:

‘in addition to the seriousness of the violation which is already foreseen in almost all national legislations, the factors to be taken into account should include at least:

- *the financial benefits for the author of the infringement derived from the violation (if calculable), in order to better reflect the impact of the violation and discourage further violations.*
- *the financial strength of the author of the violation, as indicated by elements such as the annual turnover of a financial institution or the annual income of a person responsible for the violation, which would help in ensuring that sanctions are sufficiently dissuasive even for large financial institutions.*
- *the cooperative behaviour of the author of the violation, which can contribute to encourage infringers to cooperate and in so doing increase the investigatory capacity of the authorities and therefore effectiveness of sanctions.*
- *the duration of the violation.’³³*

20. Such guidance is equally useful to public bodies entrusted with the task to enforce consumer law. In the field of consumer law, the CJEU has delivered a judgment that provides guidance in a *public* enforcement setting. The Court has held that the proportionality of a sanction on an unfair commercial practice depends on the frequency of the practice complained of, whether or not it is

³² ECJ 26 September 2013, Case C-418/11, ECLI:EU:C:2013:588, *Texdata Software*, para. 52.

³³ COM (2010) 716 def., pp 13-14.

intentional, and the degree of harm caused to the consumer.³⁴ Unfortunately, the documents of the Commission and case law of the CJEU do not provide much guidance when it comes to the balancing of the three requirements in a private law setting. Only few rulings demonstrate how to strike the balance. Factors that civil courts should take into account, when striking the balance, are largely lacking. The next paragraphs will explore what guidance is available as regards the balancing of the three requirements in the private enforcement of consumer law.

3.2. Civil Sanctions on Violations of Information Duties in Consumer Credit Agreements

21. Under Article 23 of the Consumer Credit Directive, Member States are to lay down the rules on sanctions applicable to violations of the national provisions adopted pursuant to that directive and take all measures necessary to ensure that they are implemented. Even if the choice of sanctions remains within the discretion of the Member States, such penalties must be effective, proportionate and dissuasive. To this respect,

*‘the severity of sanctions must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while respecting the general principle of proportionality’.*³⁵

22. In two rulings, the CJEU has clarified the conditions under which application of the forfeiture of entitlement to contractual interest is, as a sanction under French law for a creditor’s breach of its pre-contractual obligation to assess a borrower’s creditworthiness, compatible with the Directive. This sanction is a civil law sanction laid down in Articles L. 311-8 - L. 311-13 Code de la consommation which leads to the credit granted being deemed interest-free and free of charges. As such, it was interpreted restrictively by the Cour de cassation,³⁶ which only applied the civil sanction to the contractual interest and not to the statutory rate. According to the CJEU,

*‘if the penalty of forfeiture of entitlement to interest is weakened, or even entirely undermined, by reason of the fact that the application of interest at the increased statutory rate is liable to offset the effects of such a penalty, it necessarily follows that that penalty is not genuinely dissuasive.’*³⁷

34 ECJ 16 April 2015, Case C-388/13, ECLI:EU:C:2015:225, *Nemzeti*, para. 58.

35 ECJ 27 March 2014, Case C-565/12, ECLI:EU:C:2014:190, *Le Crédit Lyonnais*, paras 43–45.

36 Cour de cassation, 1^{re} civ. 18 February 2009, 08-12.584, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000020290643>.

37 ECJ 27 March 2014, Case C-565/12, ECLI:EU:C:2014:190, *Le Crédit Lyonnais*, para. 53.

23. The Court clearly laid the emphasis on the deterrent effect of the sanction, only incidentally mentioning the need to take into account the proportionality principle.³⁸ In its *Home Credit Slovakia*-judgment, the CJEU further elaborated on the latter principle. It held that failure by a lender to include into the credit agreement all the information which, under the Directive, must necessarily be included into such an agreement may be sanctioned by forfeiture of entitlement to interest and charges where failure to provide such information may actually compromise the ability of a consumer to assess the extent of his liability.³⁹ Therefore,

*‘the imposition, in accordance with national law, of such a penalty, having serious consequences for the creditor in the event of failure to include those items of information referred to in Article 10(2) of Directive 2008/48 which, by their nature, cannot have a bearing on the consumer’s ability to assess the extent of his liability, such as, inter alia, the name and address of the competent supervisory authority referred to in Article 10(2)(v) of that directive, cannot be considered to be proportionate’.*⁴⁰

24. The proportionality of the sanction appears to depend on the scope of the infringed information duty. If the possibility of the consumer to take an informed decision is a stake, the forfeiture sanction is appropriate.⁴¹ If not, the sanction would go further than necessary to achieve the protection goal of the Directive.

3.3. Civil Sanctions on Unfair Contract Terms

3.3.1. The Prohibition to Revise Unfair Terms

25. Contractual sanctions on unfair terms stem from the UCTD and have been fleshed out by the CJEU. The Court has ruled that Article 6(1) UCTD must be interpreted as meaning that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. The *ex officio* control of unfair terms aims to achieve the result sought by Article 6(1) in individual cases and contributes to the objective of Article 7 as it may act as a deterrent to the use of unfair contract

38 ECJ 27 March 2014, Case C-565/12, ECLI:EU:C:2014:190, *Le Crédit Lyonnais*, para. 45 with reference to ECJ 26 September 2013, Case C-418/11, ECLI:EU:C:2013:588, *Texdata Software*, para. 50.

39 ECJ 9 November 2016, Case C-42/15, ECLI:EU:C:2016:842, *Home Credit Slovakia*, para. 71.

40 ECJ 9 November 2016, ECLI:EU:C:2016:842, Case C-42/15, *Home Credit Slovakia*, para. 72.

41 This ties in nicely with the interpretation of art. 4 of (the now replaced) Dir. 85/577/EEC on doorstep selling, i.e. the obligation to lay down appropriate consumer protection measures in cases where the consumer is not informed about his right of cancellation. In ECJ 17 December 2009, Case C-227/08, ECLI:EU:C:2009:792, *Martín Martín*, para 34, the voidness of the contract is seen as such a measure ‘in that it penalises the failure to comply with an obligation which is essential (...) to create binding intent on the part of the consumer (...)’.

terms at large.⁴² In the field of contract terms, private law (including injunctions and collective declaratory actions) largely contributes to the enforcement of the UCTD and to the public interest of consumer protection.⁴³ Since 2012, the CJEU has been fine-tuning the nullity sanction and its implications. After deletion of the unfair term, the contract must continue in existence without further amendments.⁴⁴ Courts are not allowed to moderate, revise or replace the unfair term.

3.3.2. *An Ongoing Debate*

26. In different Member States (Belgium, Germany, Spain and the Netherlands to name a few), there is an intense scholarly debate going on about the scope and precise consequences of the above-mentioned case law, especially the limits of utilizing the nullity sanction as a deterrence tool.

27. On the one hand, the Court has ruled that a national court may only replace the deleted term with a default rule if the contract cannot survive without the term *and* the cancellation of the contract is to the detriment of the consumer (the ‘Kásler-exception’).⁴⁵ A contract cannot be performed if a term defining its main subject-matter or a term that is essential for the calculation of the remuneration to be paid by the consumer is removed.⁴⁶ An example of such a core term is a term regarding the exchange rate risk. However, the contract will only have to be kept valid if this is in the interest of the consumer. The substitution of the unfair core term by supplementary provisions of domestic law is not allowed in case the continuation of the contract would be contrary to the interests of the consumer.⁴⁷ The substitution is equally banned if the contract can be continued without the term. This implies that a contractual default interest rate, which has been deemed unfair, may not be replaced with the legal default interest rate. Indeed, the annulment of a term in a loan agreement fixing the default rate of interest applicable is not detrimental for the consumer concerned *‘inasmuch*

42 ECJ 21 November 2002, Case C-473/00, ECLI:EU:C:2002:705, *Cofidis*, para. 32; ECJ 26 October 2006, Case C-168/05, ECLI:EU:C:2006:675, *Mostaza Claro*, paras 27–28; ECJ 27 June 2000, Case C-240/98, ECLI:EU:C:2000:346, *Océano Grupo*, para. 28.

43 M. JÓZON, ‘Unfair Contract Terms Law in Europe in times of Crisis: Substantive Justice Lost in the Paradise of Proceduralisation of Contract Fairness’, *EuCML* Issue 4/2017, pp 160–161.

44 ECJ 14 June 2012, Case C-618/10, ECLI:EU:C:2012:349, *Banco Español de Crédito*; ECJ 30 May 2013, Case C-488/11, ECLI:EU:C:2013:341, *Asbeek*.

45 ECJ 30 April 2014, Case C-26/13, ECLI:EU:C:2014:282, *Kásler and Káslerné Rábai*.

46 ECJ 14 March 2019, Case C-118/17, ECLI:EU:C:2019:207, *Dunai*, para. 52.

47 ECJ 14 March 2019, Case C-118/17, ECLI:EU:C:2019:207, *Dunai*, paras 52–55.

as the amounts which may be demanded from him by the lender will necessarily be lower if that default interest does not apply.⁴⁸

28. Most recent court decisions seem to confirm the Kásler-exception, even though the Unicaja-judgment and subsequent court order in Banco Bilbao have caused some confusion.⁴⁹ Those decisions have been interpreted as allowing for an *unfair* default interest rate to be adjusted to the statutory rate, in accordance with national mandatory law. However, the CJEU found that the national provision requiring the recalculation of the default interest only is compatible with the Directive provided that it does not prevent the fairness assessment and subsequent removal of the unfair default interest rate. It thus appears to me that such a recalculation is not permitted if a contractual default interest were to be deemed unfair.

29. On the other hand, the CJEU states that the consumer should be restored to the legal and factual situation that she would have been in, in the absence of the unfair contract term.⁵⁰ The fairness test aims at restoring the balance between the parties while, in principle, preserving the validity of the contract as a whole.⁵¹ It is up to the Member States to

‘define the detailed rules under which the unfairness of a contractual clause is established and the actual legal effects of that finding are produced, the fact remains that such a finding must allow the restoration of the legal and factual situation that the consumer would have been in if that unfair term had not existed, by, inter alia, creating a right to restitution of advantages wrongly obtained, to the consumer’s detriment, by the seller or supplier on the basis of that unfair term’.⁵²

30. Both approaches make sense from the point of view of effective consumer protection. They are however not easy to reconcile. In the above-mentioned case of an unfair contractual default interest rate, the restoration of the legal

48 Joined cases: ECJ 21 January 2015, C-482/13, C-484/13, C-485/13 and C-487/13, ECLI:EU:C:2015:21, *Unicaja Banco and Caixabank*, paras 33–34; Joined cases: ECJ 7 August 2018, C-96/16 and C-94/17, ECLI:EU:C:2018:643, *Banco Santander and Banco de Sabadell*, paras 74–79.

49 Joined cases: ECJ 21 January 2015, C-482/13, C-484/13, C-485/13 and C-487/13, ECLI:EU:C:2015:21, *Unicaja Banco and Caixabank*; ECJ 11 June 2015, Case C-602/13, ECLI:EU:C:2015:397, *Banco Bilbao*, paras 40–46. See M.B.M. Loos, *Algemene voorwaarden*, BJv 3rd edn, nr. 445.

50 ECJ 14 March 2019, Case C-118/17, ECLI:EU:C:2019:207, *Dunai*, para. 41 with reference to joined cases: ECJ 21 December 2015, C-154/15, C-307/15 and C-308/15, ECLI:EU:C:2016:980, *Gutiérrez Naranjo and Others*, para. 61 and ECJ 31 May 2018, Case C-483/16, ECLI:EU:C:2018:367, *ERSTE Bank*.

51 ECJ 15 March 2012, C-453/10, ECLI:EU:C:2012:144, *Pereničová and Perenič*, para. 31.

52 Joined Cases: ECJ 21 December 2016, C-154/15, C-307/15 and C-308/15, ECLI:EU:C:2016:980, *Gutiérrez Naranjo*, para. 66.

and factual situation that the consumer would have been in if that unfair term had not existed requires that the consumer would have had to pay the default interest at the statutory rate. In the default situation that needs to be restored, supplementary provisions from domestic law such as those pertaining to default interests would apply.

31. Questions that have yet to be answered are 1) whether upholding a claim grounded on supplementary provisions from domestic law lodged by the user of a term that was deemed unfair for, among other things, departing from these provisions does amount to the forbidden substitution of such a term and 2) what exactly is understood by ‘supplementary (default) rules’.⁵³ Recent preliminary (still pending) referrals will possibly clarify the possibility to fill the gap left by the removal of an unfair term with supplementary or other national rules.

32. One of these referrals occurred in a Spanish case involving the potential nullity of the reference in a mortgage credit contract to an index for the applicable interest rate.⁵⁴ If this contract term were to be found unfair, there would be no agreement on the applicable interest rate. The Spanish court informs which type of gap-filling would be compatible with Articles 6(1) and 7(1) of the UCTD:

‘1. The contract is adjusted by applying the usual replacement index, the Euribor, it being a contract essentially linked to a profitable rate of interest for the benefit of the bank [which is classified as] a seller or supplier.

2. The interest rate ceases to be applied, and the sole obligation for the borrower or debtor is to repay the loan capital in the instalments stipulated?’

33. In a Belgian procedure, a set of preliminary questions relates to a civil penalty clause in the general terms and conditions of the Belgian national railway company.⁵⁵ The court enquires whether, if this clause were to be declared void, Article 6 UCTD would preclude the court from applying ‘ordinary liability law’ to compensate the national railway company for the damage suffered.⁵⁶

34. In the Netherlands questions have recently been referred in two closely related cases pending before appellate courts (resp. Amsterdam and The Hague) and

53 The UCTD neither defines the term ‘supplementary provision of national law’ nor uses it. The Court has found that unfair terms may not be replaced with what is ‘customary’ in the relevant market. The term therefore does not encompass general clauses and usages: ECJ 3 October 2019, Case C-260/18, ECLI:EU:C:2019:819, *Dziubak*. However, in ECJ 26 March 2019, Joined Cases C-70/17 and C-179/17, ECLI:EU:C:2019:250, *Abanca*, the (potentially) gap-filling provisions were statutory provisions that serve as a model or reference for contract terms but are not, technically, supplementary provisions.

54 Case C-125/18, *Gomez del Moral Guasch* (pending).

55 This penalty, in the form of a surcharge, is imposed on a passenger who makes use of public transport without having acquired a ticket.

56 Case C-349/18, C-350/18 and C-351/18, *Kanyeba* (pending).

pertaining to the same type of contract, namely Dexia share leasing contracts.⁵⁷ Whereas the first set of questions is a follow-up on the Aziz and Andriuc-decisions regarding the fairness of penalty clauses and the relevance of later circumstances (such as plunging default rates),⁵⁸ the second set of questions draws on Joined Cases C-96/16 and C-94/17 (Banco Santander and Banco de Sabadell) and concerns the possibility for the user of an unfair penalty which has been declared void to ‘*claim the legal compensation provided for by way of supplementary law*’.⁵⁹

3.3.3. Little Guidance in View of the Triad

35. In the Spanish case, attaching the second option to the nullity sanction would in theory be much more deterrent than filling the gap with the Euribor-rate. Removing the contractual interest rate without any replacement would however amount to a form of ‘supra-compensation’ which is, based on the case law discussed in paragraph 2, only allowed provided that it would not lead to an unjustified enrichment (or abuse of rights). In all three cases, the consumer would, after the removal of the clause, be placed in a legal situation *more* favourable than that provided for by the national law in force.⁶⁰ This could potentially cause a significant imbalance in the parties’ rights and obligations, *to the detriment of the seller*. In any case, the consumer would be better off after the removal of the unfair term than in the hypothetical situation wherein the term was not part of the contract and national law would apply. The over-compensatory nature of such a sanction should in my opinion be tested against the proportionality principle.⁶¹

36. The CJEU seldom discusses the (*ex officio*) sanctioning of unfair contract terms from the perspective of all three principles (dissuasiveness, effectiveness and proportionality). To my knowledge, the Kušionová-case is the only one where the CJEU brings Article 7 UCTD in relation with the triad and with the

57 Cases C-229/19 and C-289/19, *Dexia Nederland* (pending).

58 Gerechtshof Amsterdam 5 March 2019, ECLI:NL:GHAMS:2019:657, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2019:657>.

59 Gerechtshof Den Haag 18 September 2019, ECLI:NL:GHDHA:2018:2313, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2313>; Gerechtshof Den Haag 2 April 2019, ECLI:NL:GHDHA:2019:630, NJ 2019/168.

60 To ascertain a significant imbalance in the parties’ rights and obligations, to the detriment of the consumer, national courts have to carry out, in the first place, a comparison of the relevant contract term with any rules of national law which would apply in the absence of the contract term: ECJ 14 March 2013, Case C-415/11, ECLI:EU:C:2013:164, *Aziz*, para. 68; ECJ 16 January 2014, Case C-226/12, ECLI:EU:C:2014:10, *Constructora Principado*, para. 21; ECJ 26 January 2017, Case C-421/14, ECLI:EU:C:2017:60, *Banco Primus*, para. 59.

61 In the Opinion issued by AG Pitruzzella in Case C-349/18, C-350/18 and C-351/18, *Kanyeba* (pending), the *Kásler*-exception is upheld without any reference to the proportionality of the sanction.

Le Credit Lyonnais-decision.⁶² This case however does not deal with the non-binding sanction of Art. 6 UCTD but rather with a ‘procedural sanction’ (interim measures stopping the auction of a family home) as a means to prevent the continued use of unfair terms relating to the extrajudicial enforcement of a charge on immovable property. In Kušionová, the CJEU links the proportionality principle to the violation of the consumer’s fundamental rights.⁶³ Interestingly, it pursues its reasoning by referring to the ECHR’s caselaw and the need to assess the proportionality of a measure infringing on such rights. Likewise, procedural sanctions on unfair terms, which coincidentally vouch for these rights by preventing an infringement on them, need also be tested against the proportionality principle. The vantage point is however not the same: whereas the first test evaluates the proportionality of a measure in breach of fundamental rights, the second one assesses the proportionality of a measure barring the infringement.

37. It appears to me that the proportionality of the ‘no replacement-sanction’ depends of the merits of the case at hand. A casuistic answer suits national civil courts well but requires, for the sake of consistency, more guidance in the light of the triad. The only useful guideline provided by the CJEU so far is that civil sanctions on unfair terms ought to be deterrent. When pointing at Article 7(1) UCTD and asking from civil courts that they adopt protective measures in order to prevent the continued application of terms which are deemed unfair, the CJEU does not acknowledge the interests of the professional party nor the openness of the fairness clause. It seems as if, according to the CJEU, there is no way back after a term is deemed unfair: if the proportionality of the ‘no replacement-sanction’ is at stake, the term may not be unfair after all. Such an approach to civil sanctions on the breach of a general clause is however far too rigid.

38. In paragraphs 4 and 5, I will demonstrate that the proportionality of the sanction on unfair terms is a topic that requires more attention. A French court of first instance has recently asked the CJEU whether, when deciding on the sanction to be imposed on an unfair term⁶⁴ ‘is it necessary for the court to satisfy itself that the penalty thus imposed is effective, proportionate and dissuasive?’⁶⁵ This

62 ECJ 10 September 2014, Case C-34/13, ECLI:EU:C:2014:2189, *Kušionová*, para. 62.

63 ECJ 10 September 2014, Case C-34/13, ECLI:EU:C:2014:2189, *Kušionová*, para. 63.

64 The preliminary question pertaining to this sanction is the following: ‘*If the court finds that Articles 1.2.1 to 1.2.9 and 2.8 of the contract are unfair because they were not drafted in sufficiently plain and intelligible language, should all the financial terms, including the term concerning interest, be declared not written? Or should only those terms concerning the variation of the exchange rate and the term concerning currency be declared not written, retaining a fixed-interest rate, in euros? Or should another option be considered?*’

65 Case C-829/18, *Crédit logement* (pending).

question will give the CJEU the opportunity to tackle the question of the application of the triad to sanctions on unfair contract terms.

3.4. Civil Sanctions on Unfair Commercial Practices

39. The Omnibus-Directive bestows a right to individual remedies on consumers when they are harmed by unfair commercial practices. The Council's position on a draft directive added to the recital:

'The consumer should have access to compensation for damages and, where relevant, contract termination, in a proportionate and effective manner.'

40. The proposed new Article 11a of the UCPD was rephrased as following:

'Consumers harmed by unfair commercial practices shall have access to proportionate and effective remedies, including compensation for damages suffered by the consumer and, where relevant, the termination of contract. Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, damages suffered by the consumer and other relevant circumstances.'

41. This raises the question why the possible deterrent effect of damages or termination has been ignored. There is no question about the fact that compensation and the restitution effect of termination *can* have a deterrent effect (para. 2). In view of the proposed collective redress procedure, private sanctions deserve more attention. The choice whether the termination is *ex tunc* or *ex nunc* and what the effects of the termination are for the consumer, in terms of a repayment obligation or a usage fee is left to the Member States and assumingly to national courts. The same is true for the distribution of the burden of proof: a reversal of this burden in the sense that the consumer has to prove that the contract was concluded under the influence of a UCP can have a deterrent effect. More guidance on how to address this effect would have been welcome. At least, the case law with regard to the information duties of the consumer credit agreement provides some straws in the wind (para. 3.2).

4. Civil Law Sanctions in Practice in the Netherlands

4.1. The Choice of a Sanction

42. In 2017, Cafaggi and Iamiceli concluded that references to the three principles in national judicial applications were not extensive and that their definition was not consolidated.⁶⁶ This conclusion, based on illustrations, is the starting point

66 F. CAFAGGI & P. IAMICELI, 25. ERPL 2017, pp 575-618.

of the research we have been conducting on the sanctioning practice by Dutch *civil* courts.⁶⁷ The questions we asked ourselves are: how do Dutch district courts sanction EU consumer law violations and how do they give substance to the triad? Our field research first revealed that national and EU law leave much leeway to national judges to gear sanctions towards the violation of a norm, mostly by making use of their procedural autonomy (e.g. by shifting the burden of proof) but also by opting for a specific ground of avoidance.

43. Under Dutch law, an unfair commercial practice constitutes a tort, which can result in damages. However, since June 2014, Dutch law also offers the possibility to avoid any contract concluded under the influence of an unfair commercial practice (Art. 6:193j para. 3 Dutch Civil Code). To successfully invoke the avoidance of a contract, the consumer must prove that there is a causal link between the unfair commercial practice and the contract that has been concluded.⁶⁸ Courts may choose to ease the burden of proof and to shift it to the seller. In case of a breach of an information duty, which often amounts to an unfair commercial practice (cf. the Annex II to the Directive), the consumer may also invoke the avoidance of the contract on the basis of the violation of mandatory consumer law (Art. 3:40 para. 2 Dutch Civil Code⁶⁹). This sanction does not require the consumer to state and prove that there is causation between the omission and the choice to contract. Neither does the seller have the possibility to counter the claim by proving that causation is lacking. Three ‘avoidance sanctions’ thus co-exist:⁷⁰ 1) avoidance with the burden of proof lying on the consumer (Art. 6:193j para. 3 Dutch Civil Code), 2) avoidance with a presumption of a causal link (the same article with a reversed burden of proof) and 3) avoidance without any causation to prove or refute (Art. 3:40 para. 2 Dutch Civil Code). In case of an *ex officio* application of the sanction, the court may itself choose between the three options. In view of the consumer credit rulings of the CJEU, a causal link is somehow required to guarantee the proportionate nature of the sanction, which would eliminate sanction 3), but EU case law does not tell courts how to deal with causation and with the division of the burden of proof in general.

67 A team composed of three student-assistants: Hindrik Boonstra, Sjoerd Kalisvaart, Sanne Wiersma and myself.

68 The party invoking a certain legal consequence must prove the requisite facts and circumstances unless pursuant to a special rule or the requirements of reasonableness and fairness the burden of proof must be divided differently between the parties (Art. 150 Dutch Code of Civil Procedure).

69 ‘2. A juridical act that violates a statutory provision of mandatory law is null and void; yet, if this statutory provision merely intends to protect one of the parties to a more-sided (multilateral) juridical act, then such a juridical act is voidable, provided that this is in line with the underlying principle of the violated statutory provision.’

70 There are more remedies available such as rescission or damages.

4.2. *The Interpretation and Application of the Three Requirements by Dutch Courts*

44. When devising sanctions, Dutch courts, and not least the Dutch Supreme Court, seldom acknowledge the three requirements. If they do so, they tend to put a remarkable emphasis on the deterrent and preventive effect of civil law sanctions.⁷¹ The question is however, whether this accent on deterrence goes at the expense of the proportionality requirement. How should the latter (EU-) principle be interpreted in a private law setting, in a strict sense – pertaining to the balancing of interests – or in a broader sense – touching upon the legitimacy of civil law enforcement? We asked Dutch district courts (both legal officers and judges) how they look upon the triad and the interrelationship between the three requirements. We sent questionnaires to the departments dealing with consumer law cases of eight district courts and 43 questionnaires were returned to us.⁷²

45. It is difficult to tell how representative the presented results are. The courts were selected because they are spread geographically. However, it is very likely that those respondents who chose to fill in the questionnaire have a clear opinion about the topic of sanctions in consumer law. Staff members of courts handling more b2c-disputes might have a stronger incentive to answer the questions than staff members of courts who are less often dealing with breaches of EU consumer law. The respondents who returned the questionnaire may therefore not constitute a representative section of the entire group (being all the Dutch district courts). This said, staff members with clear ideas and strong feelings about civil sanctions, either positive or negative, have had the opportunity to voice their opinion. The results do tell us something about the existing points of view within the judiciary.

71 Hoge Raad der Nederlanden 12 February 2016, ECLI:NL:HR:2016:236, *Lindorff/Nazier*. See also Gerechtshof Den Haag 1 September 2015, ECLI:NL:GHDHA:2015:2303, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2015:2303>; Gerechtshof Den Haag 8 March 2016, ECLI:NL:GHDHA:2016:486, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2016:486>; Rechtbank Midden-Nederland 21 June 2017, ECLI:NL:RBMNE:2017:2980, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBMNE:2017:2980>; Gerechtshof 's-Hertogenbosch 1 May 2018, ECLI:NL:GHSHE:2018:1846, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2018:1846>; Rechtbank Rotterdam 22 June 2018, ECLI:NL:RBROT:2018:4918, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2018:4918>; Rechtbank Amsterdam 2 March 2018, ECLI:NL:RBAMS:2018:1058, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:1058>.

72 Groningen, The Hague, North-Holland, Amsterdam, Gelderland, Rotterdam, East-Brabant and Limburg. We also held brain storming sessions at six of those courts and had lively discussions about different actual cases. The dataset can be accessed at <https://doi.org/10.17026/dans-zqj-64su>.

46. First, we intended to establish whether district courts are of the opinion that they enforce EU consumer law by making use of civil sanctions that meet all three requirements (proportionality, effectiveness and deterrence).

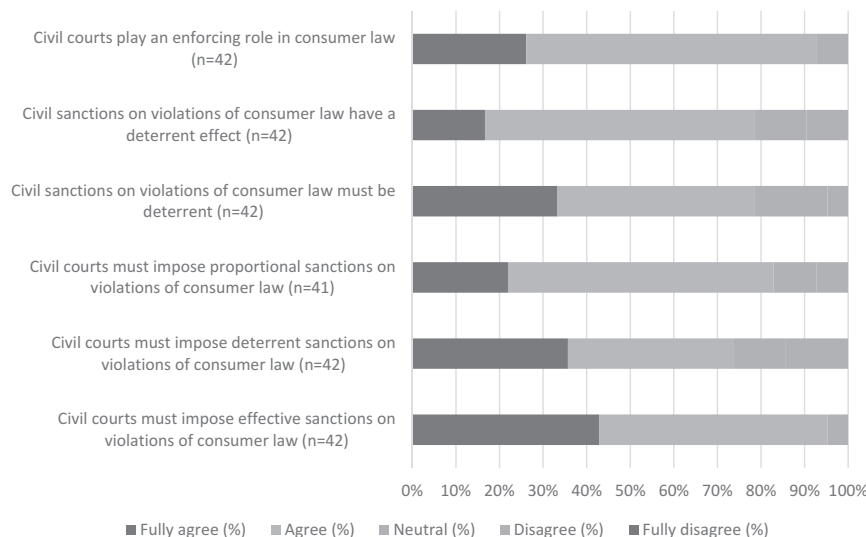


Figure 1 General statements about civil courts, civil sanctions and the triad

47. The respondents largely agree with the idea that civil courts need to impose sanctions on violations of EU consumer law and that these sanctions ought to abide by each of the three requirements. No one disagreed or fully disagreed with the statement that civil courts see themselves as *enforcers* of consumer law and that they must impose effective sanctions. Strikingly, a few respondents disagreed with the civil courts' obligation to impose proportionate sanctions. Even more respondents disagreed with civil courts having to impose deterrent sanctions. This dissenting minority however remains quite small. The same goes for the group respondents who disagreed with the statement that civil sanctions on violations of EU consumer law actually have a deterrent effect. A large majority of the respondents (nearly 80%) deems civil sanctions dissuasive. This is an interesting finding, which asks for more research: are civil sanctions actually dissuasive in the sense that further violations of consumer law are eventually prevented?

48. Second, we aimed at establishing whether staff members of district courts sense frictions between the three requirements, especially the proportionality and the deterrence requirements.

Deterrent sanctions can be proportionate (n=42)

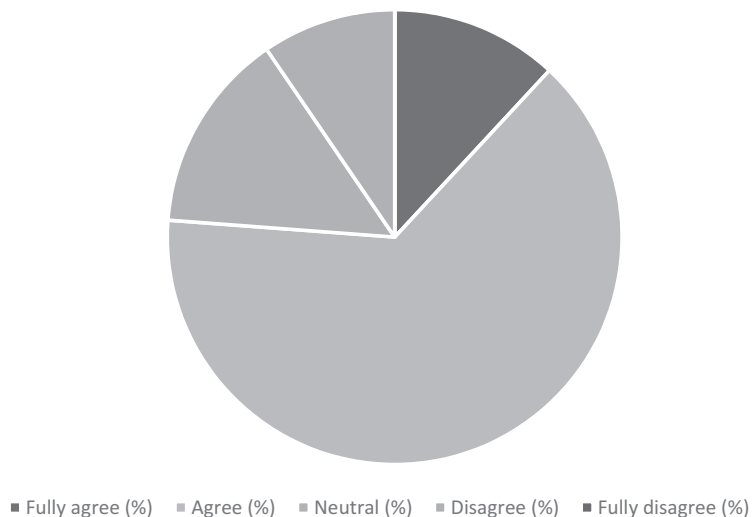


Figure 2 Statement that deterrent sanctions can be proportionate

3/4 of the respondents agreed (64%) or even fully agreed (12%) with the statement that a deterrent sanction can be proportionate. Most respondents acknowledge the possibility of a sanction simultaneously meeting the two aforementioned requirements. This makes sense, since courts largely agree on having to meet each of the three requirements when imposing a civil sanction. In the next paragraph, we will explore how Dutch district courts look upon the deterrent, effective and proportionate nature of different civil law sanctions on unfair contract terms.

49. Third, we queried what criteria Dutch courts associate the proportionality requirement with. The propositions were inspired by criteria that are traditionally taken into account by public enforcement authorities and which have been recognized by the European Commission and the CJEU (para. 3.1).⁷³

73 COM (2010) 716 def., pp 13-14.

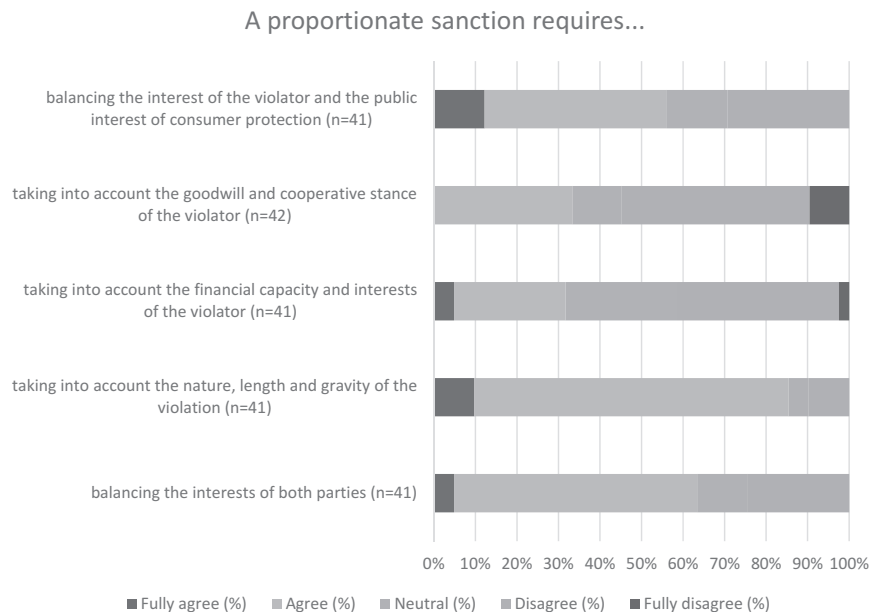


Figure 3 Proportionality criteria

50. The respondents mostly disagreed on having to take into account the cooperative behaviour and goodwill of the violator.⁷⁴ They also largely disagreed on having to pay attention to his financial capacity and interests in this respect. A slight majority (56%) of the respondents agrees with the statement that a proportionate sanction requires balancing the interest of the violator and the public interest of consumer protection. Noteworthy is that 24% of respondents disagree with having to balance the interests of both parties.

51. What conclusions can be drawn from this small survey? First, there is no consensus on the applicability of criteria developed in the realm of public law enforcement in the private law context as far as the proportionality of sanctions is concerned. Second, the respondents are quite reluctant to systematically include subjective circumstances surrounding the violator into the proportionality test. It also appears that the respondents tend to associate the test both with a balancing of individual interests and a balancing of private interests against the public interest of consumer protection. The nature, length and gravity of the violation, however, are largely recognized as being relevant factors to the test by the civil courts who took part in our survey.

⁷⁴ Since a large majority of the respondents agrees with the statement that they have to impose proportionate sanctions, they assumingly have interpreted the factors as being relevant to their own sanctioning.

4.3. Two Case Studies Involving Unfair Contract Terms

52. We also presented several case studies to the courts, requesting them to indicate how effective, proportionate and dissuasive they considered different possible sanctions to be. By doing so, we wished to assess how district courts think about the requirements with reference to concrete sanctions. This article discusses the results of two case studies pertaining to unfair contract terms, more specifically two penalty clauses. Under Dutch law, an unfair contract is avoidable (Art. 6:233 para. (a) Dutch Civil Code⁷⁵). In most cases, the contract is deemed partially void and the contract continues to exist without the voided term. What happens next remains, as it seems, unclear. Preliminary questions have been referred to the CJEU by the Appellate Court of The Hague whether courts are allowed to allow a claim based on statutory (supplementary) rules on damages after finding a term relating to the payment of compensation in the event of a consumer's non-compliance with his obligations unfair (para. 3.3.3).⁷⁶

4.3.1. Case Study 1 – the Leasing Agreement

53. The first case study pertains to a civil penalty clause in a leasing agreement. The lessee is not allowed to grow hemp, dry or cut, or to carry out any other activities which are punishable under the Dutch Opium law. If the lessee is in violation of this ban, the lessee shall owe an immediately payable fine of €20.000, no matter how many plants are found. In the case at hand, the lessee possessed 25 weed plants, which is not very much but enough to assume that there is some small business being conducted. The clause also gives the lessor the right to immediately rescind the contract and stipulates that the lessee must pay the penalty *'without prejudice to the lessor's entitlement to damages or additional damages under Dutch law'*. On the assumption that the €20.000 fine constitutes an unfair contract term,⁷⁷ we asked the district courts to evaluate two possible sanctions against the triad.

⁷⁵ *'A stipulation from the applicable standard terms and conditions is voidable:*

a. if it is unreasonably burdensome for the counterparty, having regard to the nature and content of the contract, the way in which these standard terms and conditions have been formed, the interests of each party, as evident to the other, and the other circumstances of the case.'

⁷⁶ Gerechtshof Den Haag 18 September 2018, ECLI:NL:GHDHA:2018:2313, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2313>; Gerechtshof Den Haag 2 April 2019, ECLI:NL:GHDHA:2019:630, *NJ* 2019/168.

⁷⁷ Few respondents allowed the claim based on the penalty clause (5%). Appellate courts however tend to hold this term fair and to mitigate the amount of the penalty (which is not permitted if the term is deemed unfair): Gerechtshof Arnhem Leeuwarden 6 Sep. 2016, ECLI:NL:GHARL:2016:7517, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHARL:2016:7517>; Gerechtshof Den Bosch 3 July 2018, ECLI:NL:GHSHE:2018:2797, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2018:2797>.

54. The first sanction entails the rescission of the contract and the complete removal of the fine from the contract (partial nullity). What is more, the lessor is awarded damages on the basis of the (supplementary) statutory provisions on breach of contract. The nullity of the penalty clause does not restrict the lessor's entitlement to damages under Dutch law. Respondents had to indicate whether they found this sanction to be effective, proportionate and deterrent.

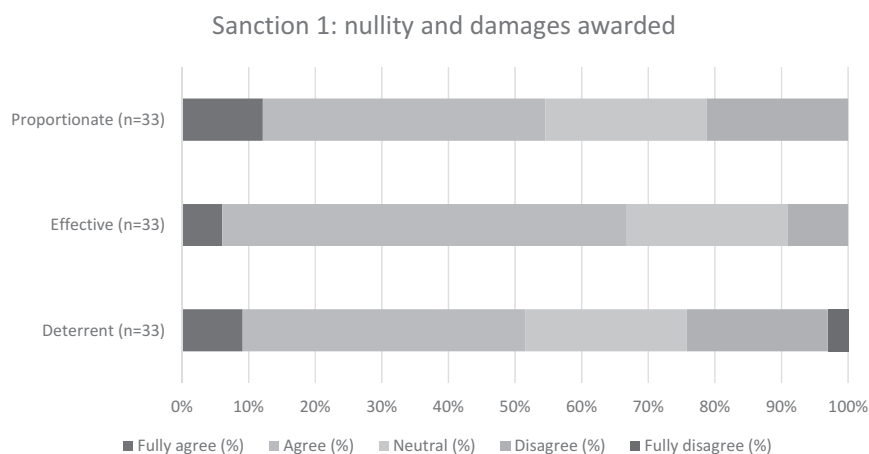


Figure 4 Sanction 1 on unfair penalty clause in a leasing agreement: nullity and damages awarded

55. The second sanction denied the lessor the entitlement to damages on the basis on (supplementary) statutory rules. Art. 6:92 para. 2 Dutch Civil Code provides that what is indebted on the basis of a contractual penalty clause will replace (i.e. take the place of) the compensation for damages that would have been due by virtue of the statutory rules. The stipulation that the lessee must pay the penalty *'without prejudice to the lessor's entitlement to damages or additional damages under Dutch law'* deviates from this Article. After the penalty clause is removed from the contract (partial nullity) the lessor is not entitled to invoke the statutory provisions.

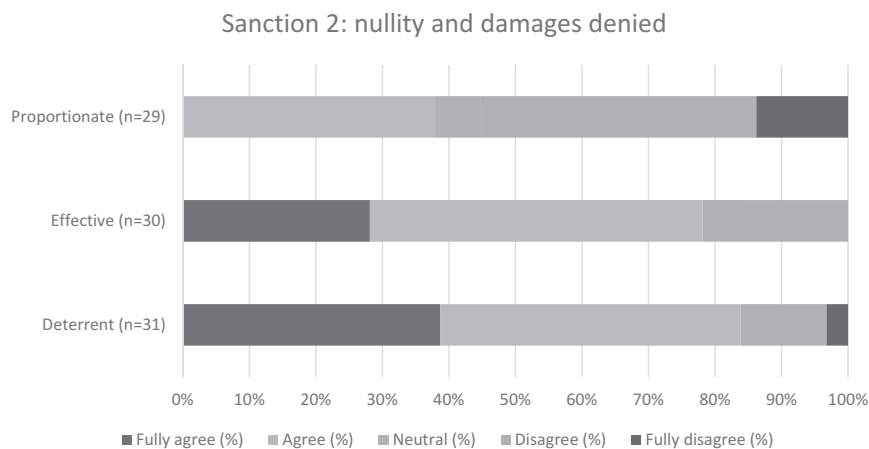


Figure 5 Sanction 2 on unfair penalty clause in leasing agreement: nullity and damages denied

56. From the answers given by the respondents, it appears that the proportionality of the second sanction is a matter of debate. A majority (55%) of the respondents do not consider this sanction proportionate. In contrast, 84% of the respondents deem this sanction deterrent,⁷⁸ whilst only 51% of them see the first sanction as a deterrent measure.

57. Only the first sanction meets each requirement according to a majority of respondents.⁷⁹ Having civil courts agree on a sanction that coincidentally meets all three requirements – notably the proportionality and the deterrence-criteria – appears to be a challenge. This is quite unexpected in view of the largely approbative reactions to the statement that a deterrent sanction can be proportionate (Figure 2).

4.3.2. Case Study 2 – the Tuition Agreement Fee

58. The second case study deals with a penalty clause in an agreement in relation to the provision of educational services. This clause obliges a student who disenrolls shortly before or after the start of the program to pay the entire tuition fee. In the (fictive) case presented to the courts, the consumer dropped out after two months, after showing symptoms of a depression. The Dutch Supreme Court

⁷⁸ A remarkable feat is that 16% of the respondents still do not consider the second sanction to be deterrent. This is more than the small group respondents (10%) who disagreed with the deterrent nature of civil sanctions in general (see table 1, second statement).

⁷⁹ Strikingly, a sheer number of respondents is not outspoken about the fulfilment of the three requirements by the first sanction.

deemed a similar contract term unfair in 2017.⁸⁰ Under Dutch civil law, a client may at any time terminate the service provision agreement (Art. 7:408 para. 1 Dutch Civil Code). If the service provision agreement ends before the service has been completed or before the period for which the service commitment was assigned has expired, and the obligation to pay a remuneration (fee) depends on the completion of the service or on the expiry of that period, then the service provider is entitled to a remuneration (fee) which has to be determined on the basis of reason (Art. 7:411 para. 1 Dutch Civil Code). The penalty clause deviated from both provisions by making it impossible to terminate the agreement in exchange of a reasonable remuneration. In the literature, the question was raised whether, after its deletion from the contract, the unfair term could be replaced with the obligation for the consumer to pay a reasonable fee, based on abovementioned statutory provisions.⁸¹

59. We asked the staff members of the district courts whether they thought the following two sanctions adhered to the three requirements. Sanction 1 entailed that the unfair contract term was avoided. Statutory law subsequently applied and the consumer was obliged to pay a reasonable fee under Article 7:411 paragraph 1 Dutch Civil Code.⁸² Sanction 2, on the contrary, entailed that the unfair term was removed from the contract (partial nullity) and not substituted by the statutory obligation to pay a reasonable fee. The consumer was entitled to terminate the service provision agreement without having to pay any remuneration.⁸³

80 Hoge Raad der Nederlanden 27 October 2017, ECLI:NL:HR:2017:2775, *TIO-TEACH*, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2017:2775>.

81 C.M.D.S. PAVILLON, 'Op de blaren zitten? Over afwijkingen van dwingend en aanvullend recht, oneerlijke bedingen en daarbij passende sancties', 1. *Tijdschrift voor Consumentenrecht & Handelspraktijken* 2018, pp 2-5.

82 Gerechtshof Den Haag 8 March 2016, ECLI:NL:GHDHA:2016:486, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2016:486>; Gerechtshof 's-Hertogenbosch 1 May 2018, ECLI:NL:GHSHE:2018:1846, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2018:1846>; Rechtbank Rotterdam 22 June 2018, ECLI:NL:RBROT:2018:4918, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2018:4918>; Rechtbank Amsterdam 10 September 2018, ECLI:NL:RBAMS:2018:6515, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:6515>; Rechtbank Noord-Holland 3 October 2018, ECLI:NL:RBNHO:2018:8050, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBNHO:2018:8050>; Rechtbank Amsterdam 26 January 2018, ECLI:NL:RBAMS:2018:883, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:883>.

83 Gerechtshof Den Haag 1 September 2015, ECLI:NL:GHDHA:2015:2303, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2015:2303>; Rechtbank Midden-Nederland 21 June 2017, ECLI:NL:RBMNE:2017:2980, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBMNE:2017:2980>.

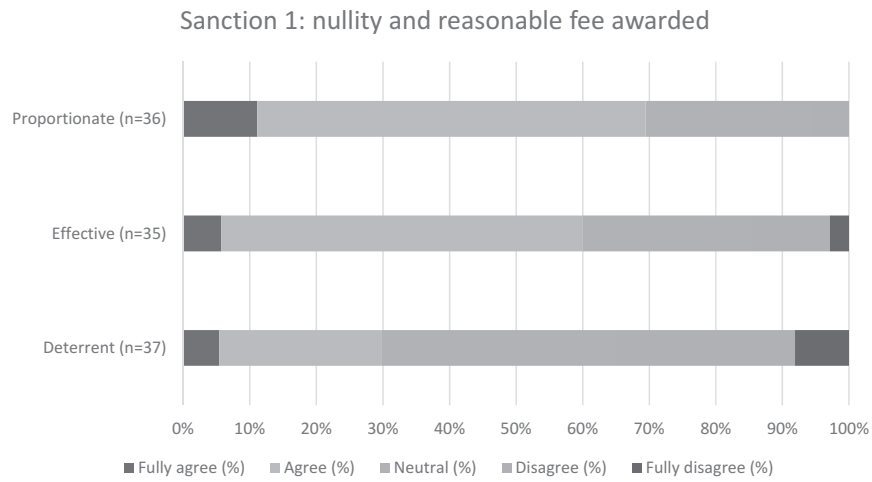


Figure 6 Sanction 1 on unfair penalty clause in a tuition agreement: nullity and reasonable fee awarded

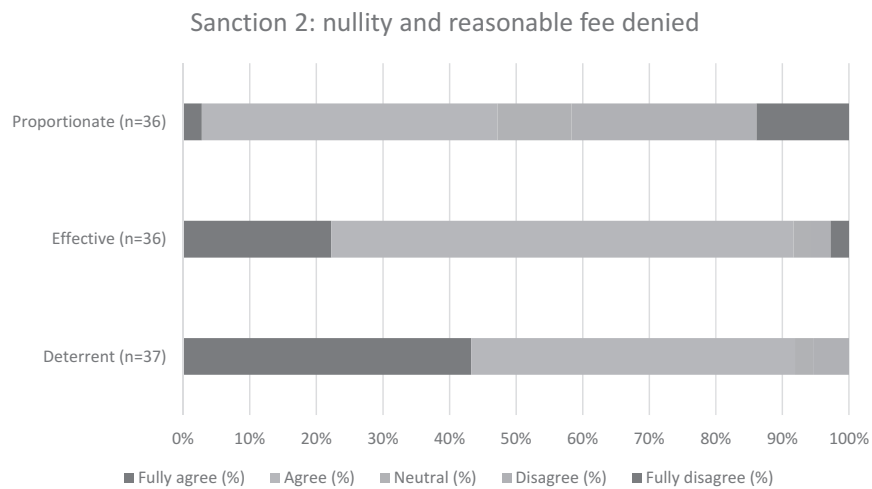


Figure 7 Sanction 2 on unfair penalty clause in tuition agreement: nullity and reasonable fee denied

60. Again, the respondents find the sanction where the user of the unfair term falls back on statutory law (sanction 1) far more proportionate than the ‘no replacement with statutory law’-option (sanction 2). Sanction 1 meets the

proportionality requirement according to 69% of the respondents, while only 47% of them consider sanction 2 to be proportionate. Inversely, the latter sanction is viewed as much more deterrent than the ‘replacement with statutory law’-option (sanction 1). Only 29% of the respondents consider sanction 1 deterrent whereas a staggering 92% agree or fully agree on sanction 2 being deterrent.

61. Remarkably, the denial of a reasonable fee in the tuition agreement is found proportionate by a larger percentage of respondents (47%) than the denial of damages in the leasing agreement (which is considered proportionate by 38% of the respondents). This could be explained by the fact that, in the latter case study, the imposition of the penalty is (largely) imputable to the lessee, whereas the reasons for the student’s disenrollment were beyond her control (illness).

62. Both case studies clearly raise questions about the fleshing out and the articulation of the proportionality and deterrence requirements within the context of the private enforcement of EU consumer law. One cannot help thinking that the financial interests of the violator actually matter, despite the fact that only 32% of the respondents (fully) agree to take those interests into account when assessing the proportionality of the sanction (table 3).

5. The New Deal: A Missed Opportunity?

63. Considering the lack of steering in EU case law and legislation, the proposed *New Deal for Consumers* was the perfect occasion to address the effective enforcement of consumer law by civil courts in individual cases. It seems that the EU legislator has missed an opportunity. As regards the sanctioning of violations of consumer law by civil courts, there is to date, little national courts can fall back on. Pending preliminary questions may offer some much needed clarification in specific cases but there is need for some abstract generalized guidance with regard to the three requirements. In the summer of 2019, the European Commission has published a guidance document based on the case law of the CJEU regarding the UCTD.⁸⁴ Such guidance is required since case law has become more and more complex and indecipherable. This much welcomed (non-binding) guidance document does not answer any of the remaining questions pertaining to the interpretation of Articles 6 and 7 of the UCTD. This was however not expected; since answering those questions would imply legislating on a sensitive subject matter. Clarifying the case law requires an interpretation of open worded terms. By doing so, the European Commission would be skating on thin ice for it cannot fill in the gaps left by EU case law without entering a legislative process.

64. The draft Omnibus-Directive contained several provisions (Arts 1(5), 3 and 4) stating that Member States shall ensure that, when deciding on whether to impose

84 https://ec.europa.eu/info/sites/info/files/uctd_guidance_2019_en_0.pdf.

an administrative penalty and on its level, the administrative authorities or courts shall give due regard to the following criteria where relevant:

- the nature, gravity and duration or temporal effects of the infringement;
- the number of consumers affected, including those in other Member State(s);
- any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- where appropriate, the intentional or negligent character of the infringement;
- any previous infringements by the trader;
- the financial benefits gained or losses avoided by the trader due to the infringement;
- any other aggravating or mitigating factor applicable to the circumstances of the case.

65. From the Council's compromise text appeared that Member States were unwilling to limit their procedural and remedial autonomy. The Councils' position therefore specified that the list of criteria to be considered when imposing a penalty is merely a non-exhaustive and indicative one. Sadly, some criteria proposed by the Commission such as the number of consumers affected, including those in other Member States, and the intentional or negligent character of the infringement were removed. These criteria would have provided some much-needed guidance. They equally served the interests of consumers and the violator. Coreper and the EP reached an agreement on 29 March 2019 that contained two new factors: the scale of the violation and the fact that penalties have been imposed on the trader for the same infringement in other Member States in cross-border cases.⁸⁵ The definitive list of criteria that sanctioning administrative bodies and courts should take into consideration, when appropriate, is as follows:

- a) the nature, gravity, scale and duration of the infringement;
- b) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- c) any previous infringements by the trader;
- d) the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;

⁸⁵ Council, Provisional agreement on a directive on better enforcement and modernization of EU consumer protection rules, 8021/19, 29 March 2019, <https://www.consilium.europa.eu/media/38907/st08021-en19.pdf>.

- e) penalties imposed on the trader for the same infringement in other Member States in cross-border cases where the information about such penalties is available through the mechanism established by the Regulation (EU) 2017/2394;
- f) any other aggravating or mitigating factor applicable to the circumstances of the case.

66. Notwithstanding the fact that they have obviously been drafted for *public* enforcement purposes, these criteria could be useful to civil courts when devising civil sanctions after a violation of EU consumer law has been established. Surely, these criteria should be geared towards a civil procedure, but this is not an impossible task. The proposed Article 11a UCPD which introduces remedies for victims of unfair commercial practices (para. 3.4) actually mentions a few criteria that partially overlap with the list above such as ‘*the gravity and nature of the unfair commercial practice and damages suffered by the consumer*’. In the field of private consumer law other possible factors, which could help establishing the proportionality, effectiveness *and* dissuasiveness of a sanction, are:

- the individual v. collective nature of the proceedings: collective remedies have a much greater impact;⁸⁶
- the expected scope and effect of civil sanctions (based on impact assessments⁸⁷);
- the need for additional deterrent *civil* sanctions in view of public enforcement already in place (e.g. penalties imposed on the trader for the same infringement by national public bodies);
- the open-ended or closed wordings of the violated norm (i.e. the knowability of its content);
- the nature of the national statutory provisions an unfair contract term is deviating from: the superseding application of national law is self-evident when the removed contract term abridges a legal right. This is less so when the annulled term stretches out a consumer’s legal duty;

86 Opinion issued by A.G. Wahl in ECJ 14 March 2019, Case C-724/17, ECLI:EU:C:2019:204, *Skanska*, para. 48.

87 Research that analyses the effectiveness of the deterrence function of private law sanctions should be incited by both the EU and Member States. Such impact assessments – do redress schemes actually prevent future infringements? – are needed to help define the possibilities and limits of deterrent private law and to legitimize the further development of the deterrence function of private consumer law.

- the nature and content of the legal act that is in violation of consumer law (e.g. a continuing performance agreement makes a replacement with supplementary rules more acceptable in view of the proportionality principle);
- circumstances on both sides which were not already factored into the unfairness-test in view of the moment of this assessment (i.e. the time of conclusion of the contract, Art. 4 para. 1 UCTD), such as the extent to which the consumer can be held accountable for the losses incurred by the seller (in case of an unfair penalty clause⁸⁸) or by herself (in case of an unfair limitation of liability clause).⁸⁹ When devising a sanction, civil courts may let go of this strict reference moment and take *all* the relevant circumstances into consideration;
- the scope of the infringed norm and the actual impairment of the consumer's ability to make an informed decision about a contract;⁹⁰
- the respective (financial) interests of *both* contractual parties: in the UK an extensive redress scheme for unfair and misleading debt collection practices led to the collapse of infringing payday lenders.⁹¹ Fejős (rightly) pointed at the harm inflicted to consumers by '*too robust enforcement*' and the need for '*sustainable redress*' that takes into account both the well-being of companies and the interests of consumers.⁹²

88 According to the Opinion issued by A.G. Pitruzzella in Case C-349/18, C-350/18 and C-351/18, *Kanyeba* (pending), the illegal behaviour of a traveller without a valid ticket should be taken into consideration when assessing the fairness of the penalty clause, paras 77-78. If the clause is nonetheless deemed unfair, the actual reprehensibility of this behaviour could in my opinion be taken into account when drafting a sanction. From the Opinion follows that if the clause is deemed unfair the sanction should be strict: no replacement with national suppletive law: paras 72-76.

89 Cf. Art. 13 para. 7 of the brand new Consumer Sales Directive of 20 May 2019(2019/771/EU) which authorizes Member States to '*regulate whether and to what extent a contribution of the consumer to the lack of conformity affects the consumer's right to remedies*'.

90 Cf. ECJ 9 November 2016, Case C-42/15, ECLI:EU:C:2016:842, *Home Credit Slovakia*, para. 71. The criteria handed by the Court – does the infringed information duty help the consumer assess its liability (and make an informed choice) – does not prove very useful in the field of unfair contract terms. The ban on unfair terms does not aim at enabling an informed choice but rather to restore a situation wherein the consumer would have had a free and informed choice to contract: ECJ 14 March 2013, Case C-415/11, ECLI:EU:C:2013:164, *Aziz*, para. 69.

91 <https://www.fca.org.uk/news/press-releases/wonga-pay-redress-unfair-debt-collection-practices>.

92 On April 4th 2019, A. Fejős published a blog with the title 'How Much Redress Is too Much? The Case of the UK Payday Loans Market': <http://recent-ecl.blogspot.com/2019/04/how-much-redress-is-too-much-case-of-uk.html>. This scheme was devised by a regulator – the Financial Conduct Authority (FCA) with an approach to enforcement as '*credible deterrence*'. A similar scheme could in other countries have been imposed by a civil court in a collective action.

67. Since the Omnibus-Directive did not seize the opportunity, it is now up to the CJEU to elaborate on factors geared towards private enforcement in its decisions in the pending preliminary proceedings. On top of that, legislation in progress, such as the proposed Collective Redress Directive, should take the deterrence function of private enforcement into account and offer adequate guidance to courts establishing collective redress schemes. This future Directive should at least pay some regard to the triad in a civil law setting. Either way, new initiatives at EU level should acknowledge the deterrent function of private remedies in EU consumer law.

6. Conclusion

68. Uncertainty among judges and differences in civil sanctions at national and European level hinder the effective enforcement of consumer law by civil courts. To exploit the deterrence potential of the private enforcement of consumer law there is need for more guidance and unity. Unfortunately, the Omnibus-Directive left this issue unaddressed. The Directive only acknowledges the effectiveness and proportionality but not the deterrent function of the new remedies (termination/damages) made available to victims of unfair commercial practices, thereby creating a strong but illusive divide between the deterrence function of public and private enforcement of EU consumer law. The deterrence function of civil remedies deserves more regard, especially in view of both the CJEU's case law regarding the *ex officio* examination and sanctioning of unfair contract terms, and the envisaged collective redress procedure. The very fact that it has been a blind spot in the *New Deal for Consumers* is hardly compatible with the latter developments in the field of European private consumer law.